IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 921 of 1986

For Approval and Signature:

HON'BLE MR.JUSTICE B.J.SHETHNA
and
HON'BLE MR.JUSTICE J.R.VORA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

STATE OF GUJARAT

Versus

DESINGBHAI K RATHVA

Appearance:

1. Criminal Appeal No. 921 of 1986

MR HM PRACHHAK Ld. APP for Petitioner No. 1

MR KB ANANDJIWALA for Respondent No. 1-3

CORAM : HON'BLE MR.JUSTICE B.J.SHETHNA
and
HON'BLE MR.JUSTICE J.R.VORA

Date of decision: 03/03/2004

ORAL JUDGEMENT

(Per : HON'BLE MR.JUSTICE B.J.SHETHNA)

The appellant - State of Gujarat, has challenged in this appeal the impugned judgment and order of acquittal dated 21.5.1986 passed by the ld. Addl. Sessions Judge, Vadodara, at Chhota-Udepur, acquitting the respondents-accused for the offence under sec. 302 read with sec. 34 IPC.

At the out set, it may be stated that when this appeal was called out, ld. counsel Mr. Anandjiwala for the respondents-accused, on instructions, stated at the Bar that respondent - Accused No. 1 - Desingbhai Kadvabhai Rathva, has expired during the pendency and final disposal of this appeal since last more than 1 and 1/2 years. However, he has not got death certificate of the respondent - accused no. 1 - Desingbhai Kadvabhai Rathva. If the respondent - accused no. 1 has already expired during the pendency and final disposal of this appeal, then, obviously this appeal qua him is required to be dismissed as having been abated. But, as stated earlier, in absence of death certificate or any specific information received by ld. APP Mr. Prachhak about the death of respondent- accused no. 1, this appeal is required to be disposed of on merits, as well.

As per the prosecution case, the incident in question took place on 21.5.1985 during the night, when deceased Metar Tersing was sleeping in the courtyard of his house. At that time, at about 2.00 O'clock in the mid-night, accused no. 1 - Desing Kadvabhai Rathva armed with axe, accused no. 2 - Saliya Parsing Rathva armed with stick and accused no. 3 - Mansing Chitabhai Rathva unarmed, came there with an intention to kill deceased Metar and in furtherance of their common intention, the accused no. 1 - Desing Kadvabhai Rathva gave blow with an axe on the right side of the neck of deceased Metar. At that time, Manchhaben, wife of the deceased woke-up and raised shouts. Thereupon, the accused ran away. Metar Tersing was removed to the hospital where he died. FIR regarding incident in question was lodged by Shambhu, son of deceased Metar, at Joj Out Post. The police registered the offence against the accused under sec. 302 read with sec. 34 IPC. Senior PSI Mr. Chavada carried out the investigation and after completing the investigation, filed charge-sheet against all the respondents-accused for the offence under sec. 302 read with sec. 34 IPC. Ld. Magistrate committed the case against all the respondents - accused to the court of Sessions. Ld. Sessions Judge framed the charge Exh. 2 against all the respondents accused for the offence under

sec. 302 read with sec. 34 IPC. Before the Sessions Court, the prosecution examined complainant - Shambhu, son of the deceased, Manchhaben, widow of deceased and other witnesses like panch witnesses and doctor. Surprisingly, I.O. Mr. Chavada who had proceeded on leave and left Gujarat and went to Rajsthan, was not examined as in near future he was not likely to come. Defence of the accused was that due to previous enmity, they were falsely involved in the case.

Considering the evidence on record, ld. Trial Judge by his impugned judgment and order dated 21.5.1985 came to the conclusion that the prosecution failed to prove its case against all the respondents-accused for the offence for which they were charged. Being aggrieved of this order of acquittal, the State of Gujarat has filed this appeal.

Ld. APP Mr. Prachhak frankly conceded before us that the ld. trial judge was fully justified in acquitting the respondents-accused no. 2 and 3 namely Saliya Parsing Rathva and Mansing Chitabhai Rathva. They have not taken any active part in the incident. Respondent no. 3 - Mansing Chitabhai Rathva was not having any arm with him at the time of incident, whereas accused no. 2 - Saliya Parsing Rathva was having stick with him but he has not made use of it. Under the circumstances, in our considered opinion, the ld. trial judge was justified in acquitting the accused no. 2 and 3 for the offence under sec. 302 read with sec. 34 IPC. However, ld. APP Mr. Prachhak vehemently submitted that there was a case against respondent - accused no. 1 who was easily identified by Manchhaben as she was sleeping nearby the deceased Metar, her husband. Ld. trial judge has considered the evidence of Manchhaben in para-16 of his judgment. It is an admitted fact that it was dark night when the incident in question took place. The incident in question took place at about 2.00 O'clock in the mid-night. Ld. trial judge was absolutely right in not believing Manchhaben when she claimed to have seen the accused at a distance of 200 ft. in the moon-light. Their conduct at the time of incident was also not natural. According to them, they chased the accused for some time and, thereafter, they returned back to the place of incident. The ld. trial judge has also observed in para-16 of his judgment that as per the evidence of doctor, with the injuries received by the deceased, he would have become unconscious immediately after the incident and he could have survived only if immediate treatment was given to him in a big hospital. Thus, the deceased was not in a position to speak,

inspite of it, both the witnesses, Manchhaben and her son Shambhu, claimed that deceased was speaking all throughout the way when he was shifted to the hospital. The ld. Judge has also observed that though independent witnesses were available, the police has not recorded their statements nor they have been examined. Ld. Judge has rightly observed that enmity is a double edged weapon which cuts both the ways. Possibility of falsely involving the accused in this case cannot be ruled out.

Under the circumstances, when the ld. Judge has given cogent reasons for acquitting all the respondents accused including the respondent no. 1 - accused, for the major offence under sec. 302 IPC, then, after a period of about 20 years of the commission of an offence, we are not inclined to interfere with the order of acquittal, more particularly, when the main accused no. 1 reported to have died during the pendency and final disposal of this appeal.

In view of the above discussion, this appeal fails and is hereby dismissed. Bail bonds of the respondents-accused stand cancelled.

(B.J. SHETHNA, J.)

(J.R. VORA, J.)
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